SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 699

PEOPLES PACKING COMPANY, INC., A CORPORATION,
Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The case originated in the District Court of the United States for the Western District of Oklahoma. The trial court denied the injunction. The opinion is reported, *Fleming* v. *Peoples Packing Company, Inc.*, 42 Fed. Supp. 868. The Circuit Court of Appeals of the Tenth Circuit reversed the case with directions to grant the injunction.

This opinion is not yet officially reported. The opinion is a part of the transcript herein (Tr. 81).

II.

Statement of Case.

The statement of the case containing all that is material to the consideration of the questions presented has been made in the petition for the writ and such statement is hereby adopted and made a part of this brief.

III.

Assignment of Errors.

The petitioner makes the following assignment of errors committed in the opinion and decision of the court below:

One.

The Circuit Court of Appeals erred in holding under the facts shown by the record before it that the petitioner by reason of its operation of the packing plant came under the provisions of the Fair Labor Standards Act of Congress, U. S. C., Title 29, Sec. 201, *et seq.*, and therefore erred in reversing the trial court and in directing that an injunction be granted against the petition as prayed for in the complaint.

Two.

The Circuit Court of Appeals erred in not holding that the petitioner came under the exemption clause of the Act.

Three.

The Circuit Court of Appeals erred in not holding that the injunction should be denied, and in not affirming the judgment and decree of the District Court.

IV.

ARGUMENT.

Proposition One.

Under the Undisputed Facts the Petitioner and Its Employees Do Not Come Within the Provisions of the Fair Labor Standards Act.

The facts as found by the trial court and as shown by the record, are these:

The petitioner is engaged in the slaughter and sale of livestock in Oklahoma City, and has been for many years. It buys its animals for slaughter and sale within the State of Oklahoma. The slaughtering is conducted at its plant in Oklahoma City. The edible portions of the animals are prepared for market and sold entirely within the State of Oklahoma, consisting in excess of 95 per cent of the value of the animals. The inedible portion consists of hides and the offal and represents from 3 to 4 per cent of the value of the animals. The hides are sold to purchasers in Oklahoma City. The offal is sold to purchasers in Oklahoma City. The purchaser of the offal reduces it to by-products and sells the same to manufacturers outside the State. The purchaser of the hides ships some of the same outside the State. There is no connection whatever between the petitioner and the purchasers of the hides and offal other than vendor and vendee.

The trial court found as a fact that the removal of the hides and offal was a servicing of the edible portions of the animals. (The findings quoted *supra*) (R. 64-66).

The petitioner respectfully contends that it was not engaged in "producing goods for commerce among the states", and that the only effect the sale of the hides and

offal could possibly have on commerce is an "indirect effect". That in order for the petitioner to be under the act would be for it to produce goods for interstate commerce, and it only produced "goods" for sale and delivery in the State. All sales come to complete rest in the State.

In defining what is the "production of goods for interstate commerce" the Supreme Court of the United States in *U. S.* v. *F. W. Darby Lumber Company,* 312 U. S. 100, 85 L. Ed. 395, says:

> "To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under Sec. 15 (a) (2) as they were construed below, constitute 'production for commerce' within the meaning of the statute. As the government seeks to apply the statute in the indictment, and as the court below construed the phrase 'produced for interstate commerce'. It embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders of extra-state customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be elected for shipment to those customers".

In *Myers* v. *Bethlehem Shipbuilding Corporation,* 88 F. (2d) 154, it is held:

> "Employees of corporation engaged in shipbuilding and also doing small amount of other manufacturing, involving interstate transportation of raw materials as well as finished products, held not engaged in 'interstate commerce' nor in business within jurisdiction of National Labor Relations Board (National Labor Relations Act, 29 U. S. C. A., Sec. 151, et seq.)."

In the opinion it is said:

> "The respondent in the course and conduct of its business causes and has continuously caused large

quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states."

"The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the board, and if not, the board is acting without authority and in violation of law. Cases, supra. See, also, Carter *v.* Carter Coal Co., 298 U. S. 238, 303, 304, 56 S. Ct. 855, 80 L. ed. 1160."

The Supreme Court of the United States, speaking through Chief Justice Hughes in *Schechter* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570, said:

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Co. *v.* United Mine Workers, 268 U. S. 295, 310, 69 L. ed. 963, 970, 45 S. Ct. 551. But where that intent is absent and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the Federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. United Mine Workers *v.* Coronado Coal Co., 259 U. S. 344, 410, 411, 66 L. ed. 975, 995, 42 S. Ct. 570, 27 A. L. R. 762; United Leather Workers International Union *v.* Kerkert & M. Trunk Co., 265

U. S. 457, 464-467, 68 L. ed. 1104, 1106, 1108, 44 S. Ct. 623, 33 A. L. R. 566; Industrial Asso. *v.* United States, 268 U. S. 64, 82, 69 L. ed. 839, 855, 45 S. Ct. 403; Levering & G. Co. *v.* Morrin, 289 U. S. 103, 107, 108, 77 L. ed. 1062, 1065, 1066, 53 S. Ct. 549. In the case last cited we quoted with approval the rule that had been stated and applied in Industrial Asso. *v.* United States, supra, after review of the decisions, as follows: 'The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act'. While these decisions related to the application of the Federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.

"The question of chief importance relates to the provisions of the code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle

commodities brought into a state and there dealt in as a part of its internal commerce."

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, the court says:

"As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade', and includes transportation, purchase, sale and exchange of commodities by the citizens of the different states.

"The power to regulate commerce, embraces the instrumentalities by which commerce is carried on.

"That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to Federal regulation under the commerce clause.

"The power of Congress to regulate interstate commerce does not extend to the establishment of minimum wages, maximum hours of labor, the right of collective bargaining, and conditions of employment in the bituminous coal-mining industry.

"The power of Congress under the commerce clause is limited to matters directly affecting interstate or foreign commerce, and does not extend to matters, the effect of which, whatever its extent, is indirect.

"The Federal regulatory power in matters relating to interstate commerce ceases when commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins."

(In the case at bar the commercial intercourse ended when the hides and offals were sold to local concerns.)

In the opinion it is said:

"The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the Schechter case, supra. The only perceptible difference between that case and this is

that in the Schechter case, the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceased when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the Schechter case. On the contrary, the situations were recognized as akin. The opinion, at page 546, after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: 'Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.' And again, after pointing out that hours and wages have no direct relation to interstate commerce and that if the federal government had power to determine the wages and hours of employees in the internal commerce of a state because of their relation to cost and prices and their indirect effect upon interstate commerce, we said, p. 549:

" 'All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not a power.'

"A reading of the entire opinion makes clear what we now declare that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production

before interstate commerce has begun, or to sale and distribution after it has ended."

A case squarely in point is *Bagby* v. *Cleveland Wrecking Co.*, 28 Fed. Supp. 271.

The court held:

"The mere fact that goods manu*g*actured or produced locally pass later into interstate commerce does not make the transaction one constituting 'interstate commerce'. U. S. C. A., Const. Art. 1, Sec. 8, cl. 3.

"For a local activity to come within the interstate commerce clause, it must have more than an indirect and remote effect upon interstate commerce. U. S. C. A. Const., Art. 1, Sec. 8, cl. 3.

"In action to recover wages and damages for alleged violation of Fair Labor Standards Act, complaint alleging that plaintiffs were employed to clean brick, wood and other materials salvaged from old structures, the greater part of which was shipped and transported to other states, and there sold, merchandised or disposed of, was required to be dismissed since complaint did not show that employer was engaged in 'commerce'. Fair Labor Standards Act of 1938, Sec. 1, et seq., and Sec. 6, 29 U. S. C. A., Sec. 201, et seq., and Sec. 206."

In *Santa Cruz Trust Packing Co.* v. *National Labor Rel. Bd.*, 303 U. S. 453, 82 L. Ed. 954, the court says:

"That fruits and vegetables handled by a canning company are grown within the state and that the activities of such company are confined to the state does not, where a substantial percentage of its products are sold by it in interstate and foreign commerce, render the National Labor Relations Act inapplicable.

"'Where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify federal intervention for its protection.'"

We do not consider that petitioner was engaged in producing goods for commerce among the states any more than a farmer would be who butchered his own cattle or hogs and sold the hides and offal to a purchaser of hides and offal, who later processed the same and sold the result in commerce. The line of demarcation has to be drawn some where. Why should not the line be drawn where the hides and offal come to rest in the hands of third parties who purchase and pay for the same and later on treat and ship the result as an independent act?

In *Kirschbaum* v. *Walling*, 316 U. S. 517, 86 L. ed. 1638, this question is treated in a learned opinion by Mr. Justice Frankfurter for the court. It is there said:

> "The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. See, e. g., Virginia R. Co. *v.* System Federation, R. E. D. 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592. Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law. Compare, for example, United Leather Workers International Union *v.* Herkert & M. Trunk Co., 265 U. S. 457, 68 L. ed. 1104, 44 S. Ct. 623, 33 A. L. R. 566, and Levering & G. Co. *v.* Morrin, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549, with National Labor Relations Bd. *v.* Friedman-Harry Marks Clothing Co., 301 U. S. 58, 81 L. ed. 921, 57 S. Ct. 645, 108 A. L. R. 1375, and National Labor Relations Bd. *v.* Fainblatt, 306 U. S. 601, 83 L. ed. 1014, 59 S. Ct. 668. Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the

States without putting an unconstitutional burden on interstate commerce. Compare Heisler *v.* Thomas Colliery Co., 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83, and Oliver Iron Min. Co. *v.* Lord, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526, with Sunshine Anthracite Coal Co. *v.* Adkins, 310 U. S. 381, 84 L. ed. 1263, 60 S. Ct. 907."

Again the Court said:

"We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation."

So it appears that each case must depend on its own facts. Petitioner contends that it never intended to cover cases where the work of the employee only (a) remotely affects commerce amongst the states or (b) where a local transaction is completed according to the contractual rights of the parties before any one touches the goods in contemplation of interstate commerce. This is the situation here. The petitioner had the undoubted right to sell the hides and offal in Oklahoma; the purchaser thereof had the unquestioned right to purchase the same. The title as well as possession completely and finally passed at the advent of the sale. The petitioner did not "produce" these hides or the inedible portions of the carcass "for sale" in interstate commerce. It produced them for sale in the state. Likewise it "produced" the edible portions for sale in the state and did sell all of them in the state. It was not necessary to the production of the meats, etc., processed by petitioner which were sold and consumed in Oklahoma, that the independent operators who purchased the hides and offal should themselves process the offal and hides and then send the result into commerce amongst the states. So the ultimate use to which the purchasers of the hides and offal were put was not a necessary act upon

which the production of the goods to be sold by the petitioner depended. In the absence of such a necessity the Act should not apply.

PROPOSITION TWO.

The Exemption Clause of the Act Applies Here.

Section 213, Title 29 U. S. C. A. provides:

> "The provisions of Section 206, and 207, shall not apply in respect to * * * (2) any employee employed in any retail or servicing establishment the greater part of whose selling or servicing is in intrastate commerce * * *".

On this question the trial court found as a fact:

> "It is disclosed in the record that the value of the hides and offal, being that portion of the carcasses which is inedible, represents from 3 to 4 per cent. of the total value of the carcasses. Therefore the removal of the hides and offal from the edible portion of the animals is as much, or more, an act in connection with the preparation of the edible portion for market as it is an act of the salvaging of the inedible portion."

This exemption clause must have a purpose. It must certainly apply where the main object of the plant is to produce goods for local consumption. It most certainly does apply to the situation here under the facts as found by the trial court. Stated precisely here is the factual situation: Petitioner has a slaughter room. From 4 to 7 employees kill and strip the animal. The edible portions are made into food and sold and consumed by local customers. The hides and offal are then immediately sold to consumers at a fixed value per hundred weight. All in the world the employees in the killing room are doing is to prepare the animal so it can be used for food. In other

words, they service the animal. The result is that 96 per cent of the animal goes into food products and is sold as such to local customers in the state.

The effect of the holding of the Circuit Court opinion and judgment is that the 4 to 7 employees in the petitioner's plant are held to be under the Act, while the other employees are held not to be under the Act. When the killing operations are separated they become a servicing for the objective of the plant which must be conceded to be the production of foods for sale in the state.

The employees of the petitioner who removed the hides from the animals "serviced" the animals as a necessary procedure to place the edible portions in condition to be sold and consumed in the state. They did not produce goods or work on goods to be sold out of the State. The ultimate consumer was in the State.

To hold that the sale of the offal was ineffective to sever petitioner's connection therewith would be tantamount to saying that the well recognized right of bargain and sale under state law is a matter of Federal concern. The question of state rights is fundamentally involved here. Until Congress has specifically spoken on the question the state law on sales certainly would and should prevail. Subdivision J of Section 3 of Fair Labor Standards Act of 1938, the Act here involved seems to recognize this fundamental principle in the language thereof.

The employees of the petitioner who removed the hides from the animals serviced the animals for one purpose, only: to place the edible portions thereof in a condition to be sold to local trade. It was necessary.

Our conception is that Butcher Packing Company to whom the offal is sold and which company in turn processes the same and sells the result outside of the state is engaged in processing goods for commerce within the meaning of

the Act. Likewise E. W. Gruendler & Company to whom petitioner sold the hides and who in turn processed the same and sold 95 per cent of the result outside of the state is also engaged in commerce within the meaning of the Act. Not so in respect to the petitioner who did none of these things.

The petitioner asks that this Court grant the writ of certiorari prayed for, and review the decision of the Court below.

Respectfully submitted,

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